Sri Minal Construction Sdn Bhd v Hong Kong Bank Malaysia Berhad

HIGH COURT (KUANTAN) — CIVIL SUIT NO 22–41 OF 1997
HELILIAH J
20 APRIL 2007

Banking — Banker and customer — Duty of banker — Whether bank had contractual obligation to discharge charge and return title document to customer within specified time frame — Whether must be done within reasonable time frame

Banking — Banker and customer — Duty of banker — Whether bank owed customer duty of care to discharge charge and return title document to customer within specified time frame — Whether bank had discharged such duty — Whether there were extraneous and supervening events

The plaintiff was a customer of the defendant bank. The defendant granted a loan facility amounting to RM220,000 to the plaintiff and as consideration for the same, the plaintiff charged a piece of land in favour of the defendant. The plaintiff defaulted in repayment of the loan causing the defendant to commence foreclosure proceedings and obtaining an order for sale. Thereafter, the monies owed by the plaintiff to the defendant were fully settled by the plaintiff on or around November 1992. The defendant instructed its solicitors to prepare the discharge documents for their execution. However, the discharge of the chare and the return of the title deed to the land was only effected in July 1996, which was a period of approximately three years and seven months after full settlement of the loan. The plaintiff filed this action claiming against the defendant for breach of contract and/or breach of duty of care arising from failure to effect the discharge of charge and return of title deed to the plaintiff.

Held, dismissing the plaintiff's claim:

(1) According to the express or implied terms of the charge agreement nothing was stated on the time frame within which the documents were to be returned. The provisions of the NLC mentioned above prescribe the procedure but not the time frame within which the processes of discharge were to be executed and completed. The onus is on the plaintiff to establish what was the reasonable time frame but that aspect has not been forthcoming. The evidence of DW2 had not been countered by any evidence on the part of the plaintiff to indicate what is the alleged time frame in contractual terms for the defendant company to complete the process of the discharge (see paras 11–13).

(2) The plaintiff had made an over sweeping proposition on the alleged duty of care and its alleged breach by the defendant bank. The relationship between plaintiff and the defendant bank is one of chargor and chargee. In alleging a cause of action in tort the plaintiff appears to be claiming a concurrent liability. This requires a further examination of the relationship of the parties. What has to be considered here is not the usual banking business of issuing cheques and other similar financial services. This is not a case where the bank was rendering services with specific instructions. The defendant kept the grant under a contract and the release of the documents unencumbered are in accordance with statutory provisions of the law. In fact the plaintiff has hardly addressed the issue. Under the circumstances if at all the question is whether the Bank has taken reasonable care in passing on the matter to the firm BCB & K being a firm on its panel of solicitors (see para 16).

(3) The court does not accept the proposition that the plaintiff was resigned to accept the firm in this case as the sole firm to deal with the discharge. Rather it is the case where the plaintiff had left it entirely to the defendant and which leads to the question what sort of duty then had been assumed by the bank. The plaintiff has failed to indicate on what grounds it could be alleged that defendant is the all knowing expert on the question of discharge. The defendant bank has in fact properly to my mind given it to BCB & K to handle the matter. The plaintiff on a balance of probabilities has not discharged its legal burden in indicating what else the defendant bank could have done when it handed the matter to a firm of solicitors on its panel (see paras 17 & 34).

(4) However there is another factor which is not to be overlooked here namely the conduct of the plaintiff. The plaintiff even according to the evidence of PW1 expected everyone else to take on whatever responsibility. But PW1 had to be reminded several times of his own responsibility to settle unpaid quit rents. But the conduct that was unreasonable or overwhelming was PW1's own act of delay in imparting information that land was to be sold and that a buyer had been found. There was also a reference to an inability to secure a new loan from another financier although this was mentioned in passing (see para 54).

(5) There was no express or implied contractual term nor statutory duty on the part of the defendant to prepare the discharge with a certain time frame. There was also no parallel tortious act attributed to the defendant. The matter of discharge had been assigned to the firm the services of which had been accepted by the plaintiff by deed and conduct. There was here a combination of causes that could not be described as the tortious act of the defendant bank. The bank's responsibilities do not extend to extraneous and supervening events and even more so the conduct of the plaintiff in not communicating more information until a very late state. In other words the plaintiff's own conduct vis-a-vis the defendant bank was instrumental in contributing towards the alleged failure of the sale and purchase agreement for it could not be said that the defendant bank ought to have known what other purposes the document was required for other than the fact that the defendant bank was to take steps to have the discharge effected (see para 62).

[Bahasa Malaysia summary

Plaintif adalah pelanggan kepada bank defendan. Defendan telah memberikan kemudahan pinjaman, berjumlah RM220,000 kepada plaintif dan sebagai balasan kepadanya, plaintif telah mencagarkan sebidang tanah kepada defendan. Plaintif telah mengingkari pembayaran semula pinjaman menyebabkan defendan memulakan prosiding sekat tebus dan memperolehi perintah untuk jualan. Selepas itu, wang-wang yang terhutang oleh plaintif kepada defendan telah diselesaikan sepenuhnya oleh plaintif pada atau sekitar November 1992. Defendan mengarahkan peguamcaranya untuk menyediakan dokumen-dokumen perlepasan bagi perlaksanaan mereka. Walau bagaimanapun, perlepasan gadaian dan kembalian surat ikatan hak milik kepada tanah hanya dibuat pada Julai 1996, iaitu dalam masa kira-kira tiga tahun dan tujuh bulan selepas penyelesaian sepenuhnya pinjaman. Plaintif memfailkan tindakan ini menuntut terhadap defendan pelanggaran kontrak dan/atau perlanggaran kewajipan berjaga-jaga berikutan kegagalan untuk mendaftarkan perlepasan gadaian dan kembalian surat ikatan hak milik kepada plaintif.

Diputuskan, menolak tuntutan plaintif:

(1) Menurut kepada terma-terma tersurat dan tersirat perjanjian gadaian tiada dinyatakan berkenaan tempoh masa dokumen-dokumen akan dikembalikan. Peruntukan-peruntukan dalam KTN yang disebut di atas menyediakan prosedur tetapi tidak tempoh masa yang mana proses-proses perlepasan gadaian akan dilaksanakan dan disempurnakan. Beban terletak pada plaintif untuk memastikan apakah tempoh masa yang munasabah tetapi aspek itu tidak kunjung tiba. Keterangan DW2 tidak dibalas dengan sebarang keterangan di pihak plaintif untuk menunjukkan apakah dakwaan tempoh masa dalam terma-terma kontrak bagi syarikat defendan untuk menyempurnakan proses perlepasan (lihat perenggan 11–13).

(2) Plaintif telah membuat satu kenyataan untuk menghapuskan dakwaan kewajipan berjaga-jaga dan dakwaan kemungkiran oleh bank defendan. Hubungan antara plaintif dan bank defendan adalah antara penggadai dan pemegang gadaian. Bagi mendakwa kausa tindakan dalam tort plaintif seperti ingin menuntut untuk liabiliti serentak. Ini memerlukan pemeriksaan selanjutnya bagi hubungan pihak-pihak. Apa yang perlu dipertimbangkan di sini bukan perniagaan perbankan biasa yang mengeluarkan cek-cek atau perkhidmatan-perkhidmatan kewangan yang sama. Ini bukanlah kes yang mana bank menyediakan perkhidmatan-perkhidmatan dengan arahan-arahan khusus. Defendan telah menyimpan geran bersama kontrak dan memberikan dokumen-dokumen yang tiada sekatan bersesuaian dengan peruntukkan-peruntukkan berkanun undang-undang. Plaintif telah habis-habisan memberi tumpuan kepada isu ini. Dalam keadaan-keadaan jika persoalan sama ada Bank telah mengambil perhatian munasabah menyerahkan perkara ini kepada Tetuan BCB & K sebagai firma dalam panel peguamcaranya (lihat perenggan 16).

(3) Mahkamah tidak menerima cadangan bahawa plaintif telah menolak untuk menerima firma dalam kes ini sebagai satu-satunya firma yang menguruskan perlepasan. Ini adalah kes di mana plaintif telah meninggalkan keseluruhannya kepada defendan dan membawa kepada persoalan apakah kewajipan yang dijangka oleh bank. Plaintif telah gagal untuk menyatakan atas alasan-alasan apakah untuk mengatakan bahawa defendan adalah sememangnya pakar ke atas persoalan perlepasan. Plaintif atas imbangan kebarangkalian tidak melepaskan beban perundangannya dalam mengatakan apa lagi bank defendan akan buat bila ia menyerahkan perkara kepada firma peguamcara panelnya (lihat perenggan 17 & 34).

(4) Walau bagaimanapun, terdapat satu lagi faktor yang tidak boleh terlepas pandang di sini iaitu perlakuan plaintif. Plaintif juga menurut kepada keterangan PW1 menjangka siapa saja boleh mengambil apa-apa tanggungjawab. Tetapi PW1 hendaklah diingatkan beberapa kali tentang tanggungjawabnya untuk membayar cukai-cukai pintu yang masih belum dibayar. Tetapi kelakuan yang tidak munasabah atau yang ketara adalah kelakuan PW1 sendiri yang lewat dalam menyampaikan maklumat berkenaan tanah yang akan dijual dan bahawa sudah ada pembeli. Terdapat juga rujukan kepada ketidakupayaan untuk mendapatkan pinjaman baru daripada syarikat kewangan lain walaupun ia ada dinyatakan dalam serahannya (lihat perenggan 54).

(5) Tiada terma kontrak tersurat dan tersirat atau kewajipan berkanun di pihak defendan untuk menyediakan perlepasan dalam jangka masa tertentu. Tidak ada juga anggapan tindakan tort selari daripada defendan. Perkara pelepasan telah diberikan kepada firma yang mana perkhidmatan telahpun diterima oleh plaintif dengan surat ikatan dan kelakuan. Di sini terdapat dua sebab yang tidak dapat digambarkan sebagai perlakuan tort bank defendan. Tanggungjawab bank tidak terletak kepada keadaan-keadaan istimewa dan luar biasa dan lebih-lebih lagi kelakuan plaintif kerana tidak menyampaikan maklumat tambahan sehingga pada peringkat yang agak lewat. Dalam erti kata lain, kelakuan plaintif sendiri berbanding dengan bank defendan adalah instrumental dalam menyumbangkan kepada dakwaan kegagalan perjanjian jual beli yang mana ia tidak boleh dikatakan bahawa bank defendan mestilah mengetahui tujuan-tujuan lain dokumen-dokumen diperlukan selain daripada fakta bahawa bank defendan hendaklah mengambil langkah-langkah untuk menguatkuasakan perlepasan (lihat perenggan 62).]

Notes

For cases on duty of banker, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1818–1824.

Cases referred to

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Banker & Ors [2006] 5 MLJ 1 (refd)

Anns v Merton London Borough Council [1978] AC 728 (refd)

Caparo Industries plc v Dickman [1990] 2 AC 605 (refd)

Donoghue v Stevenson [1932] AC 562 (refd)

Henderson v Merret Syndicates Ltd [1995] 2 AC 145 (refd)

A *Hogan v Bentinck West Hartley Collieries (Owners) Ltd* [1949] 1 All ER 588 (refd)
James v Barclay's Bank plc [1994] 4 Bank LR 131 (refd)
Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp [1979] Ch 384 (refd)
Schioler v Westminister Bank Ltd [1970] 2 QB 719 (refd)
Yong & Co v Wee Hood Teck Development Corporation [1984] 2 MLJ 39 (refd)

B **Legislation referred to**
Banking and Finanacial Institutions Act 1989 s 50
Civil Law Act 1956 ss 3, 5
National Land Code 1965 ss 242, 249, 250, 251, 252, 278, 279, 280, 314

C *K Mura Raju (Mura Raju & Co) for the plaintiff.*
K Anandhan (Skrine)for the defendant.

Heliliah J:

D **[1]** In this suit the plaintiff's claim against the defendant is founded on an alleged breach of contract and/or breach of duty of care to the plaintiff arising from a failure and/or refusal and/or neglect to effect the discharge of a charge and the return of the title deed to certain land within a reasonable time. According to the plaintiff the defendant only did so on or about 23 of July 1996 which was a period of
E approximately three years and seven months after the full settlement of the loan monies. The plaintiff alleged that by reason of the breach, an agreement with a third party for the sale of the land in question had been rescinded and in consequence of which the plaintiff has suffered damages and loss.

F **[2]** The relevant agreed facts are as follows:

1. The plaintiff is a private company registered in Peninsular Malaysia with its address for business at 2319, Taman Bersekutu, Jalan Kubang Kurus, 24000 Kemaman, Terengganu Darul Iman and previously known as 'SIAWLIM SDN BHD'.

G 2. The defendant is a commercial bank which took over the whole business/management of 'The Hongkong and Shanghai Banking Corporation Ltd' wherein the vesting was confirmed pursuant to the Court Order dated 4 October 1999 at the High Court of Malaya in Kuala Lumpur vide Originating Summons No D5-24-180 of 1993 and s 50 of the Banking and
H Finanacial Institutions Act 1989.

3. At the material time, the plaintiff was a client of the defendant and as consideration for the granting of a loan facility amounting to RM220,000 by the defendant to the plaintiff, the plaintiff had charged a piece of land known as Geran 21572, Lot 947, Bandar Georgetown hereinafter referred to as
I ('the property') which it owned in favour of the defendant. Further, the defendant registered a charge instrument (charge) dated 19 May 1984 in favour of the defendant.

4. The plaintiff had defaulted in the repayment of the said loan causing the defendant to commence foreclosure proceedings and an order for sale dated

24 May 1989. However, the monies owed by the plaintiff to the defendant under the said banking facilities were ultimately and fully settled by the plaintiff on or about November 1992.

5. The defendant vide its letter dated 11 November 1992 had instructed their then solicitors, Messrs Balendran Chong Bodi & Khatijah (or BCB & K) to prepare the necessary discharge documents for their execution.

6. Messrs BCB & K vide their letter dated 5 May 1993 had sought the assistance of their agents, Messrs Lim Cheng Poh Lim & Rahim of Penang to execute the registration of the discharge of charge.

7. The defendant was notified vide letters dated 29 January 1996 and 4 February 1996 to return the title deed free from any encumbrances of the charge before and/or by 14 February 1996 because the plaintiff had allegedly found a buyer for the property at the price of RM1.5m.

8. The defendant's solicitors by their letter 27 February 1996 by way of reply to the plaintiff's letters dated 29 January 1996 and 4 February 1996 notified the plaintiff of the need for him to pay the quit rent of 1995 and 1996 amounting to RM2,436.

9. The plaintiff paid the sum of RM1,160 on 21 March 1996 being partial payment for the quit rent for 1996.

10. The balance sum of RM1,276.00 was paid by the plaintiff on 16 April 1996.

11. The defendant only returned the said title deed to the plaintiff on 23 July 1996.

[3] While the parties may have posed multifarious issues before the court it is imperative at the outset to state that the court is not an adviser to the plaintiff in the sale and purchase transaction that was undertaken by the plaintiff. The court finds itself to be in a position to forewarn the parties that the third parties namely HLTR Development Sdn Bhd with whom there was alleged an agreement concluded with the plaintiff on 24 February 1996 is not before this court and it is irrelevant and entirely unwarranted for the court to advise the parties on question 10, 11, 12, 13 and 14 as alleged issues. Such issues were crafted in certain ways as to disguise the true nature of the action filed by the plaintiff against the defendant. On a preliminary basis the court finds that questions 10, 11, 12, 13, 14, 15 and 16 should not be put before the court. For example question 15 would result in the court determining whether the plaintiff or the third party is in breach of an alleged agreement and thereby advising the parties as the agreement has been legally rescinded, an absolutely absurd situation. On the basis of privity of contract the defendant bank has no contractual nexus with the third party.

[4] The court is primarily concerned with an alleged breach of contract or a breach of duty of care in the nature of a tortious liability arising from an alleged delay in the return of certain documents of title by the defendant bank.

[5] The court would therefore address the issues as follows:

THE ALLEGED BREACH OF CONTRACT

[6] The contractual relationship between plaintiff and defendant was the result of the defendant granting the plaintiff a term loan (around May 1984) of RM220,000 whereby as security for the loan, the plaintiff had executed a charge instrument on a place of land held under grant 21572, Lot 947 Seksyen 3 Bandar Georgetown Penang in favour of the defendant. According to the oral evidence of the plaintiff the entire term loan was settled by 2 December 1992. P38 is a true copy of Form IB A issued pursuant to s 242 of the National Land Code (Act 56 of 1965) or NLC for the purposes of the charge. Apart from the express provisions of the instrument s 249 to s 252 NLC stipulate that certain provisions are to be implied.

[7] It is further observed that the provisions of Chapter 5 Part Sixteen of the NLC (relating to charges and liens) contain provisions relating to discharge. It is noted further that s 278 NLC has the marginal note 'Discharge otherwise than by payment' s 280 NLC contains, inter alia, the following that is '……any chargor may apply to the Registrar that section (ie s 314 NLC) for cancellation of the registration of the charge on the grounds that a discharge has been effected by payment to the chargee'.

[8] It would appear that s 278 and s 279 NLC do not provide in express terms the situation here where the plaintiff had paid the debt in full. However the phraseology used in s 278(1) namely the words '(1) Any chargee may by instrument in Form 16N … discharge' indicates an action by the chargee. No attempt was made by the plaintiff to obtain the discharge himself which could have been done in the alternative according to the provisions of the aforesaid s 314 (as specified above) read with Forms 18B and 18C of the NLC.

[9] The plaintiff has instead adduced in evidence P9 a letter in reply from BCB & K. The body of the letter is reproduced hereinafter as the contents are relevant for the purposes of this case. The evidence of DW2 indicated that on 11 November 1992 the defendant bank had written to BCB & K giving instructions for the preparation of the necessary discharge documents. D27 indicates that accompanying that letter were sent the original title deed of the plaintiff's property, a Form 40 and Charge Presentation No 5995/84 Jil 297 Fol 5. Further to that DW2 testified that on 25 November 1992 the defendant bank had also sent two copies of Borang 16N and two sets of Change of Name Form. It is interesting to note that Borang 16 N is the form that is to be used pursuant to s 278 of the NLC (ie discharge of the charge as also mentioned above).

[10] The following is the excerpt from P9 that is the letter addressed to the plaintiff. This letter was in response to the letter dated 27 February 1993 apparently written by the plaintiff company. The contents are very pertinent and the parts of which are as follows:

We have clarified with Mr Balendran regarding this matter. According to Mr Balendran, your matter with the Bank which is a court matter has been fully settled and the fees paid. The fees have been transferred and there is no money left in your court case file.

This *matter that we are handling now is on conveyancing matter and a new file has been opened. We have on 11 November 1992 received instructions from the Bank (HSBC) to discharge the property and to file the document with the appropriate authorities.*

This is a separate matter from your court file.

Kindly send us the sum of $853 — within 7 days of receipt of the letter failing which we send all documents back to the Bank.

(Emphasis added.)

[11] From the facts that have been described above it is found that the plaintiff as a legal entity had only dealt with the defendant cursorily. According to the express or implied terms of the charge agreement nothing was stated on the time frame within which the documents were to be returned. The provisions of the NLC mentioned above prescribe the procedure but not the time frame within which the processes of discharge were to be executed and completed.

[12] The onus is on the plaintiff to establish what was the reasonable time frame but that aspect has not been forthcoming. Instead the gaps in the plaintiff's case were filled in by the evidence of DW2 (see the responses to questions 7, 8, 9, 10, 11, 12, 13 in witness statement).

[13] The evidence of DW2 had not been countered by any evidence on the part of the plaintiff to indicate what is the alleged time frame in contractual terms for the defendant company to complete the process of the discharge.

[14] The evidence led by the defendant disclosed that the defendant had undertaken the necessary steps by communicating to BCB & K about the discharge of the documents. At this stage it becomes imperative to avert to what this court has observed at the outset. It is plain that the plaintiff in its zealousness to maintain that the defendant was liable had led evidence on the alleged sale and purchase agreement between the plaintiff and third party referred to in brief as HLTR. The entire suit filed by the plaintiff is hinged on the alleged sale and purchase agreement. It is to noted that a great deal of evidence had been adduced relating to various aspects of the agreement with a third party. Unfortunately it has to be expressed that on a hind sight there has been a waste of judicial time. This is so as the sale and purchase agreement relates to a third party which has no connection whatsoever with the defendant bank. The entire transaction between the plaintiff and the third party based on privity of contract was of a contractual nature between the two. The only link if any was that for the purpose of the sale and purchase agreement the documents of title were required by the plaintiff. This leads to the question of the alternative claim in the nature of a tortious liability filed against the defendant in this case.

THE ALLEGED DUTY OF CARE

[15] It is trite that parties are bound by their pleadings. The statement of claim of the plaintiff incorporates, inter alia, two paragraphs that appear to refer to a breach of duty of care and they are as follows:

(5) Selanjutnya ataupun secara alternatifnya atas alasan plaintif telah menjelaskan

pinjaman kepada defendan seperti di atas defendan ada suatu kewajipan (duty of care) untuk melepaskan gadaian itu dan mengembalikan suratan hakmilik hartanah tersebut kepada plainitf dengan tanpa halangan tersebut dalam suatu masa yang munasabah.

(6) Defendan dengan kemungkiran kontrak dengan plaintif dan/atau kemungkiran kewajipannya (duty of care) kepada plaintif seperti di atas telah cuai, enggan ataupun gagal melepaskan gadaian itu dan mengembalikan suratan hakmilik hartanah tersebut dengan tanpa halangan dalam tempoh masa yang munasabah dan hanya membuat demikian pada atau lebih kurang 23 Julai, 1996, suatu masa yang mengambil tiga tahun dan tujuh bulan selepas kesemua hutang pinjaman dijelaskan.

[16] Having considered the above and the written submission of the counsel for plaintiff the court finds that the plaintiff had made an over sweeping proposition on the alleged duty of care and its alleged breach by the defendant bank. The relationship between plaintiff and the defendant bank is one of chargor and chargee. In alleging a cause of action in tort the plaintiff appears to be claiming a concurrent liability. This requires a further examination of the relationship of the parties. What has to be considered here is not the usual banking business of issuing cheques and other similar financial services. This is not a case where the bank was rendering services with specific instructions. The defendant kept the grant under a contract and the release of the documents unencumbered are in accordance with statutory provisions of the law. In fact the plaintiff has hardly addressed the issue. Under the circumstances if at all the question is whether the Bank has taken reasonable care in passing on the matter to the firm BCB & K being a firm on its panel of solicitors.

[17] The court does not accept the proposition that the plaintiff was resigned to accept the firm in this case as the sole firm to deal with the discharge. Rather it is the case where the plaintiff had left it entirely to the defendant and which leads to the question what sort of duty then had been assumed by the bank. The plaintiff has failed to indicate on what grounds it could be alleged that defendant is the all knowing expert on the question of discharge. The defendant bank has in fact properly to my mind given it to BCB & K to handle the matter.

[18] It is therefore relevant at this stage to refer to the very document referred to by the plaintiff namely P9. Paragraph 3 in P9 has expressly indicated that the defendant had given instructions to BCB & K to act on the matter.

[19] P10 amounts to an acceptance of the retainer of the services of BCB & K. But the next question is whether BCB & K was acting as agent of the defendant or whether the defendant is also the client of BCB & K while bearing in mind that the plaintiff is not the sole customer dealing with the defendant bank. Again the plaintiff has failed to adduce any evidence or authority for the proposition that the defendant has a duty of care in addition to the terms of the express or implied terms of the charge to ensure that the plaintiff obtains delivery of the grant within a specified

time. Nothing has been specified to indicate to the court that it is within the scope of the services of the defendant to ensure how and when the documents are to be returned. A

[20] This brings the matter to another level. Even assuming that BCB & K acts as an agent of the bank or that the bank is acting on the advice of the firm could it be alleged that there has been a breach of the duty. For that purpose the scope of the retainer of the firm could be examined. Before referring to specific documents in the present proceedings there are certain legal principles to be considered relating to the question tortious liability. B

[21] In *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Banker & Ors* [2006] 5 MLJ 1 the Federal Court in the course of its judgement stated, inter alia, the following, per Pajan Singh Gill FCJ (as he then was) at p 12: C

> In our judgement, it is an implied term of the contract between the bank and the customer that the bank will observe reasonable care and skill in and about executing customer's orders (see *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER p 363.) D

[22] This observation however has to be taken in the context of the facts of the case where the parties were engaged in the negotiation of a facility agreement. In the present case as indicated above the defendant bank was seeking the assistance of BCB & K to undertake the processes of discharge. E

[23] In the absence of further case law in Malaysia it is proposed to analyse the case law in the United Kingdom by virtue of the Civil Law Act 1956 (namely ss 3 and 5) in relation to the development of the law on professional negligence which is concurrent with contractual liability. F

[24] In *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384 the view (per Oliver J at p 402 c) is that: G

> The extent of the legal duty in any given situation must, I think be a question of law for the court (per Oliver J at 402c). Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants, is of little assistance to the court; whilst evidence of the witnesses' view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the court's function to decide. H

[25] It will be pedantic for the purposes of this judgement to trace the development of English law or for that matter within the commonwealth on the question of professional negligence. It is still useful however to note judicial propositions in the context of the scope of a retainer since the defendant bank has given instructions to BCB & K the legal firm to complete the processes of discharge. I

[26] The plaintiff's general allegations against the defendant render it necessary to consider the standard of duty as liability in the tort of negligence is only possible if this court is prepared to hold that the duty of care arises in the relationship that exists between the plaintiff and the defendant in the circumstance of the case.

[27] The expansion of duty of care has developed form the classic explanation of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 at p 560. Lord Atkin's 'neighbour test' which has been of crucial importance to the development of the negligence liability in tort has been acted upon and is found, inter alia, in a statement of principle propounded in *Anns v Merton London Borough Council* [1978] AC 728 at p 751 per Lord Wilberforce:

> The position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

[28] A further development from the ratio in the *Ann*'s case are to be found in several other decision including *Caparo Industries plc v Dickman* [1990] 2 AC 605 at p 617 per Lord Bridge:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J. in the High Court of Australia in *Sutherland Shire Council v Heyman* [1985] 60 ALR 1, pp 43–44, where he said:
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> > It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.

[29] It is also in the context of the *Caparo Industries plc v Dickman* that Lord Bridge (with whom Lords Roskill and Ackner agreed) began his discussion of the professional man's liability to third parties from the premise that he owed a duty in tort to his own client and the following was stated (at p 619):

> The question what, if any, duty is owed by the maker of a statement to exercise due care to ensure its accuracy arises typically in relation to statements made by a person in the exercise of his calling or profession. In advising the client who employs him the professional man owes a duty to exercise that standard of skill and care appropriate to his professional status and will be liable both in contract and in tort for all losses which his client may suffer by reason of any breach of that duty.

[30] Judicial support for tortious duty which arises from the relationship between the parties also arose for decision in *Henderson v Merret Syndicates Ltd* [1995] 2 AC 145. In this case the names on a number of syndicates at Lloyd's brought actions against both their member agents and managing agents in respect of massive losses which they had suffered. The relevant excerpts of the lead judgement of Lord Goff is cited here as specific approval had been given to the judgement of Oliver J in the *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384. In referring to that judgement, Lord Goff stated (at p 190):

> The judgement of Oliver J in the *Midland Bank Trust case* [1979] Ch 384 provided the first analysis in depth of the question of concurrent liability in tort and contract. Following upon *Esso & Petroleum Co. Ltd v Mardon* [1976] QB 801 it also broke the mould, in the sense that it undermined the view which was becoming settled that, where there is an alternative liability in tort the claimant must pursue his remedy in contract alone.

[31] Lord Goff had also appraised the development of the case law in other countries which was described as striking.

[32] In part of his appraisal of the following was stated (at p 190):

> Attempts have been made to explain how doctors and dentists may be concurrently liable in tort while other professional men may not be so liable, on the basis that the former cause physical damage whereas the latter cause pure economic loss (see the discussion by Christine French in (1981–84) 5 Otago LR 236, pp 280–281). But this explanation is not acceptable, if only because some professional men, such as architects, may also be responsible for physical damage. As a matter of principle, it is difficult to see why concurrent remedies in tort and contract, if available against the medical profession, should not also be available against members of other professions, whatever form the relevant damage may take.

[33] The aforementioned judicial proposition is cited with some length for the reason that while *Henderson v Merret Syndicates Ltd* was strictly speaking a case which concerned Llyods agents, Oliver J's judgement in the *Midland Bank Trust Co Ltd* was a case on professional negligence by a solicitor. I also find comfort in the fact that in *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39, Syed Agil Barakbah FCJ (as he then was), in delivering the judgement of the court also expressly applied the approach in the Midland Bank Trust Co Ltd case. In the course of the judgement his Lordship had then examined the question of a retainer, the

A contractual duty of the solicitors in that case as well as the liability in tort. With respect to the liability in tort his Lordship stated:

> The liability of a solicitor may be viewed in two aspects. At common law the retainer imposes upon him an obligation to be skillful and careful and for failure to fulfil this obligation he may be made liable in contract for negligence whether he is acting for reward or gratuitously. On the other hand, like any other individual, a solicitor is liable for his wrongful acts and if the circumstances justify the charge, he may be made liable to his client in tort (see *Halsbury's Laws of England* (3rd Ed) Vol 36 p 96, para 131). He owes a duty not to injure his client by failing to do that which he had undertaken to do and which his client has relied on him to do. (*Midland Bank trust Co Ltd*). Applying this principle, we are satisfied from the evidence on record, that the learned Judge was justified in concluding that the appellants had not only failed to perform their obligations under the contract with the required skill and care but were also liable in tort for their wrongful act of depriving the Respondents from having security for the loan they have advanced by failing to execute a memorandum of charge.

[34] Having considered the legal principles that provide guidance in the issues before me, I turn once again to the facts of this case. It is reiterated that the plaintiff on a balance of probabilities has not discharged its legal burden in indicating what else the defendant bank could have done when it handed the matter to a firm of solicitors on its panel.

[35] The question therefore also pivots on the assumption of the responsibility by BCB & K. Again on account of the zealousness of the plaintiff to strike a claim against the defendant bank no submission has been offered on the alleged negligence, if or lack of reasonable care on the part of the action undertaken by the defendant in assigning the matters to BCB & K.

[36] The evidence of PW1 does not throw light on the actual issues before me. The evidence of PW2 was primarily to establish that there was a sale and purchase agreement which was not completed.

[37] Nevertheless it is still necessary to appraise the case for the defendant bank. Before considering the evidence of DW2 it is necessary to mention that DW1 also a solicitor testified that she merely acted for the intended purchaser so there is no question of her role contributing towards any professional negligence against the defendant bank.

[38] I would therefore focus on the question of the steps taken by BCB & K for the defendant bank. DW2 gave a detailed account of the steps to be taken towards discharge. It is quite clear that there is no standard or uniform time frame within which the discharge could be completed.

[39] Plaintiff has adduced in evidence P9 the contents of which disclosed that BCB & K had instructions from the defendant to discharge the property. The plaintiff had also produced a letter vide P6 (dated 19 April 1992) while the defendant had produced D52 (dated 9 January 1993) D53 (dated 17 February 1993). These letters in sequence clearly revealed that the solicitor's firm BCB & K were pursuing the

matter pertaining to the discharge even earlier than the date shown in P9 which was 5 March 1993. P10 revealed that it was only upon reminder that the plaintiff responded and this was also evidenced by P12.

[40] The next documents to be taken inter account in P16. Although P16 was dated 2 May 1997 it gave a resume of events or actions taken in relation to the processes discharge. The material part of the P16 is reproduced as follows:

> We act on behalf of Hongkong Bank Malaysia Berhad who has handed us your letter dated 24 April 1997 with instructions to reply as follows:
>
> We have on 11 November 1992 received the original title, Form 40 and duplicate charge from the bank with instruction to prepare the discharge. We prepared the relevant document and wrote several letters to your client to pay us the sum of RM853.00 being our fees and disbursements together with the original copy of the quit rent for 1993 for presentation of the discharge of charge.
>
> On 6 April 1993 your client paid us only the sum of RM500. However he has not given us the original receipt of quit rent for 1993. It was only sometime in 1994 that the quit rent was settled.
>
> As the property is in Penang, we were instructed by the bank to send the discharge of charge to their Solicitors in Penang M/s Azahari Ariffin & Associates and we accordingly on 13 September 1994 sent the title deed, duplicated charge, a copy of the discharge of charge duly stamped, the current quit rent, the Power of Attorney of the bank and our cheque for RM117 to the said firm for presentation of the discharge.
>
> However in 1994 The Hongkong And Shanghai Banking Corporation Limited was locally incorporated and we have to sent the various documents to the said firm before the discharge of charge could be entertained.
>
> Since then we have written a series of letters to the said firm inquiring about the discharge. We were informed that they have misplaced our documents and they were trying to trace the same. Since there was no response, our Dato Bodi went personally to Penang to inquire about the said title and it was only sometime in February 1996 that they managed to find our documents together with the duplicate charge without presentation at all to the Land Office in Penang.
>
> On 9 February 1996 our Dato Bodi who was then in Penang personally took the said documents and handed these documents to another firm of Solicitors Ghazi & Lim to present the discharge for us. We were informed by Ghazi & Lim that the quit rent for 1995 and 1996 amounting to RM2,436 has not been paid and we on 27 February 1996 we wrote to your client.
>
> We were informed on 16 March 1996 by your client stating that the quit rent for 1995 has been paid and they enclose a copy of the cheque RM1,160 for payment of the 1996 quit rent. We accordingly wrote to Ghazi & Lim on 21 March 1996 together with the payment of RM1,160 for the 1996 quit rent.
>
> However on 3 April 1996 we received a letter from Ghazi & Lim stating that the quit rent for 1996 has been increased to RM2,436 and we requested to pay the difference of RM1,276.
>
> On 14 April 1996 we received payment from your client vide his letter of even date and we accordingly on 16 April 1996 sent the said sum to Ghazi & Lim. The registration of discharge in Penang took sometime. We wrote to Ghazi & Lim to try to expedite the registration of the Discharge.

> On 23 July 1996 we received the original title together with the duplicate charge from Ghazi & Lim and we on 26 July 1996 wrote to your client to come and collect the original title which was duly discharge. Since your client could not come to our office to collect the document we have handed the said title to our branch office in Kemaman and the said title was duly taken personally by your client on 11 August 1996.

[41] The fourth paragraph of P16 is corroborated by P13 where by the firm BCB & K had sent to another legal firm that is Azhari Ariffin & Associates to take further action. The fourth para of P16 indicated that BCB & K had been instructed by the bank to send the discharge of the charge to Messrs Azahari Ariffin & Associates who is referred to as 'their solicitors' that is the bank's solicitor.

[42] It is indicated in P13 that a copy of P13 was sent to the plaintiff company. The chain of events stated in P16 is also evidenced by encl D54 where Azahari Ariffin & Associates by that letter dated 29 September 1994 had taken action on the matter. P40 and P41 also support the development of events outlined in P16. It is in evidence that the defendant bank was informed of the situation as shown in P41. D35 indicated that eventually the matter was also with the firm of Messrs Ghazi & Lim 'for registration of the locally incorporated name.

[43] The significance of the precise scope of the retainer is clearly explained in the judgment of Oliver J in *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp*. There it was argued that a solicitor, who had been instructed to advise a client on the tax implications of exercising an option to purchase land, should also have considered his client's interests more generally. He should have checked to see whether the option was registered and on finding that it was not, he should have advised his client the option would be void against third party purchasing the land. Oliver J rejected this argument, stating:

> There is no such thing as a general retainer in that sense. The expression:my solicitor' is as meaningless as the expression 'my tailor' or 'my bookmaker' in establishing any general duty apart from that arising out of a particular matter in which his services are retained. The extent of his duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do.
>
> Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing upon solicitors – or upon professional men in other spheres – duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it upon himself to pursue a line of inquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as *Duchess of Argyll v Beuselinck* [1972] 2 Lloyd's Rep 172; *Griffiths v Evans* [1953] 1 WLR 1424 and *Hall v Meyrick* [1957] 2 QB 455 demonstrate that the duty is directly related to the confines of retainer. (per Oliver J at pp 402–403).

[44] In considering further the scope of duty of the bank the plaintiff counsel in p 14 of the submission stated that the alleged loss of RM400,000 is recoverable

because this loss should have been reasonably forseeable 'bearing in mind the position of the defendant as a banker engaged in business of trading and taking all sorts of securities for such lending'.

[45] This appears again to be a generalised proposition or opinion. The bank undertakes a wide range of functions in the financial sphere. Different parts of the bank's services are kept relatively distinct. In the absence of specific instructions a banker's duties will be confined to maintaining and operating the customer's account.

[46] This is shown by the decision in *Schioler v Westminister Bank Ltd* [1970] 2 QB 719. Again in *James v Barclay's Bank plc* [1994] 4 Bank LR 131 the Court of Appeal rejected a contention that a bank had assumed the role of general financial adviser to the plaintiff who operated two farms, in spite of the existence of promotional literature in which it held itself out as possessing expertise in farming matters. The bank could not be deemed to be advising on such specialised matters unless such advice had been specifically sought.

[47] In the present case the plaintiff by deed and conduct had accepted the firm of BCB & K to undertake certain matters and beyond that there is nothing on record to indicate that the defendant bank held out assurances.

[48] The breach of duty here if any still rests on the question whether it could be said that there was a failure on the part of the BCB & K to follow up for it cannot be the case that the bank should oversee every aspect of the steps taken by that firm. It has been suggested in the submission of the learned counsel for the plaintiff that the notional failure in duty could even be discerned from the late payment of the quit rents. This line of submission is tantamount to suggesting that there is here strict liability in the circumstances of the case. But this aspect is controverted by the document creating the charge whereby the chargor is not relinquished from the responsibility of settling the payments of quit rents. This is again an attempt by the plaintiff to place the blame elsewhere.

[49] It is noted that while the plaintiff has its office address in Kemaman, the land is in Penang, the defendant bank is situate in Kuantan and yet another solicitor in Penang had also to be further assigned to deal with the matter.

[50] It is therefore appropriate at this point to consider the issue of causation in the circumstances of the case. As noted above there were lapses in the progress of getting the discharge and the question to be addressed was whether there was here what has been referred to by the learned counsel for the defendant as the question of the effect of a novus actus which as stated in *Hogan v Bentinck West Hartley Collieries (Owners) Ltd* [1949] 1 All ER 588 at p 593 which as observed, per Lord Simonds:

> … can only be answered on a consideration of all circumstances and in particular the quality of that later act or event.

[51] There are several aspects to be considered. There was here the omission of another legal firm which apparently (but not really established) had contributed

towards the delay in the presentation of the documents. The question to be considered here was whether the omission was such that the defendant or the firm BCB & K should bear responsibility.

[52] The omission by the firm in Penang could be described as unreasonable or flagrant for even files had been misplaced. Could it be reasonable and fair to state that this was something quite forseeable by the defendant bank.

[53] Again could it be said that the exercise undertaken in 1994 for the local incorporation of the Hongkong and Shanghai Banking Corporation was unreasonable and it should have been forseen to have the sole impact on the plaintiff's position where the defendant had already initiated steps in 1992. There was here a combination of causes that protracted the process. It is not unknown that there could be no end as to the possible consequences of human conduct and should therefore the defendant be held liable in tort for more than he had bargained for.

[54] However there is another factor which is not to be overlooked here namely the conduct of the plaintiff. The plaintiff even according to the evidence of PW1 expected everyone else to take on whatever responsibility. But PW1 had to be reminded several times of his own responsibility to settle unpaid quit rents. But the conduct that was unreasonable or overwhelming was PW1's own act of delay in imparting information (see exh D33) that land was to be sold and that a buyer had been found. There was also a reference to an inability to secure a new loan from another financier although this was mentioned in passing.

[55] The letter was dated 29 January 1996 (D33) and required the documents of title for an agreement which was alleged, to be concluded on 15 February 1996 and yet the documents of title were expected to be returned on the 14 February 1996. It is to be noted that this letter was made to be addressed to the defendant irrespective of the fact that the plaintiff had been in communication with the firm of BCB & K. The simple fact was that the defendant was not in the position of a financial or legal adviser to the plaintiff on his personal business dealings.

[56] Another controverting aspect was the fact that PW1 had conceded that he had been dealing with yet another legal firm that is Tay & Chua. However there is no evidence of any communication emanating from this firm to convey to the firm of BCB & K of the need to expedite.

[57] The very basis upon which this action has been instituted was the failed sale and purchase agreement. Yet the defendant and not their solicitors (who as observed above could also be termed the clients of BCB & K) was the entity that was given a dateline for the first time.

[58] I do not regard it useful to pronounce on the various clauses of the sale and purchase agreement as this is a matter between HLTR Development Sdn Bhd and the plaintiff. Whatever was agreed between the plaintiff and a third party which was not

originally part of the relationship between the defendant as chargee and the plaintiff as chargor cannot be permitted to be part of the causation unless it is reasonable to state that the defendant should forsee what the plaintiff intended to do next with the document of title. This was a case where the PW1 expected business gains or economic gains but the question remains whether they were reasonably forseeable by the defendant.

[59] In any case the plaintiff has not been able to establish the date that the agreement was actually concluded. I agree that from the outset no time frame in the circumstances of this case was indicated to establish that time was indeed the essence.

[60] However it is also found again that certain clauses which were alleged to be inserted at the instance of plaintiff and related to the document of title should not have been put to issue for this court to decide. If at all it should have been a different cause of action involving the HLTR. What is relevant here is that the very inaction of the plaintiff in bringing more information to the knowledge of the defendant or the firm of BCB & K is the impact that constitutes a novus actus.

[61] Yet another matter to be observed is what has been termed as loss of chance or loss of bargain. In the present context the question of the reasonable terms or otherwise of the sale and purchase agreement again is not the responsibility of the defendant. It is also questionable here whether what the plaintiff wanted was in fact a profit, for the land was eventually sold. Again it was not something which it could be reasonably be termed as forseeable by the defendant.

[62] In the final analysis I find therefore that there was not express or implied contractual term nor statutory duty on the part of the defendant to prepare the discharge with a certain time frame. I also do not find a parallel tortious act attributed to the defendant. The matter of discharge had been assigned to the firm the services of which had been accepted by the plaintiff by deed and conduct. There was here a combination of causes that could not be described as the tortious act of the defendant bank. The bank's responsibilities do not extend to extraneous and supervening events and even more so the conduct of the plaintiff in not communicating more information until a very late state. In other words the plaintiff's own conduct vis-a-vis the defendant bank was instrumental in contributing towards the alleged failure of the sale and purchase agreement for it could not be said that the defendant bank ought to have known what other purposes the document was required for other than the fact that the defendant bank was to take steps to have the discharge effected.

[63] This action is therefore dismissed with costs.

Plaintiff's claims dismissed with coats.

Reported by Brendan Navin Siva